IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

KEN SOZA,	)	
	)	2 CA-CV 2007-0039
Plaintiff/Appellee,	)	DEPARTMENT B
	)	
v.	)	MEMORANDUM DECISION
	)	Not for Publication
EL JARDIN FLORISTS, INC.,	)	Rule 28, Rules of Civil
	)	Appellate Procedure
Defendant/Appellant.	)	
	)	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. C20070092

Honorable Charles V. Harrington, Judge

VACATED AND REMANDED WITH DIRECTIONS

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V Á S Q U E Z, Judge.

¶1 In this forcible entry and detainer action, appellant El Jardin Florists, Inc. appeals from the trial court's judgment awarding appellee Ken Soza possession of a parcel of real property, the right to ownership and possession of which was disputed. El Jardin argues the court erred in granting judgment in favor of Soza because he failed to establish his right of possession and claim of ownership of the property. We conclude this action falls outside the scope of Arizona's forcible entry and detainer statute, and vacate the judgment, remanding it to the trial court with directions to enter its order dismissing the complaint.

Facts and Procedural Background

¶2 This action is the latest in a series of lawsuits arising from an April 2004 agreement between Soza and Jesse Miranda for the transfer of several parcels of real property. The property that is the subject of this action, 4010 S. 12th Avenue, Tucson, Arizona, (the property) was apparently transferred from Soza to Miranda in accordance with the terms of the agreement. A quitclaim deed that granted title to the property to El Jardin was signed by Miranda, purportedly on Soza's behalf. The deed was recorded with the Pima County Recorder on March 8, 2005.[1]

[1]We note there is a discrepancy between the agreement and the quitclaim deed with respect to the description of the subject property. Both contain the same legal description but the agreement lists the property address as 4010 S. 12th Avenue, whereas the quitclaim deed lists the address as 526 W. Palmdale, Tucson, Arizona. Neither party has argued the agreement and quitclaim deed refer to different properties; and, even assuming this was the case, our decision would not change.

¶3 In March 2006, Soza brought a quiet title action against a number of defendants, including El Jardin, in Maricopa County Superior Court.[2] In the course of that action, which is apparently still pending, the court on June 5, 2006, granted Soza a default judgment concerning the title of the property and two other properties. However, the default judgment was specifically entered against several named defendants, and El Jardin was not among them.

¶4 On January 8, 2007, Soza filed this forcible entry and detainer action against El Jardin in Pima County Superior Court. His complaint in this action asserts his ownership of the property, based on the default judgment issued by the Maricopa County Superior Court. However, aside from a notice to vacate mailed to El Jardin, asserting Soza's right to possession, there was nothing further in, or attached to, the complaint to establish Soza's right to either ownership or possession of the property as against El Jardin.

¶5 El Jardin filed a motion to dismiss pursuant to Rule 12(b)(6), Ariz. R. Civ. P., contending the default judgment from Maricopa County Superior Court was legally insufficient to establish Soza's right to possession of the property, and thus Soza had failed to state a claim for relief. The trial court entered judgment in favor of Soza and issued a judgment ordering El Jardin to vacate the property. This appeal followed, and the trial court granted a stay of its judgment, conditioned on El Jardin's payment of $5,000 per month as the "reasonable rental value" of the property. Because the annual rental value of the

[2]Case No. CV 2006-003058.

property is thus not less than three hundred dollars, we have jurisdiction of this appeal under A.R.S. § 12-2101(B).

Discussion

¶6 "[F]orcible entry and detainer is a statutory proceeding, the object of which is to provide a summary, speedy and adequate means for obtaining possession of premises by one entitled to actual possession." *Heywood v. Ziol*, 91 Ariz. 309, 311, 372 P.2d 200, 201 (1962). We review a trial court's interpretation and application of statutes de novo. *Vales v. Kings Hill Condo. Ass'n*, 211 Ariz. 561, ¶ 9, 125 P.3d 381, 384 (App. 2005).

¶7 Regardless of the merits of the parties' claims regarding their rights to possession of the property, Soza failed to allege any facts that would constitute grounds upon which a forcible entry and detainer action may be based. Because his complaint "fails utterly" to show that any cause of action for forcible entry and detainer exists against El Jardin, Soza has therefore failed to state a valid claim under Rule 12(b)(6). *Coulter v. Stewart*, 93 Ariz. 242, 246-47, 379 P.2d 910, 913 (1963) (finding that such error cannot be waived). Although the parties do not argue this issue on appeal, this is "an error going to the foundation of the action which may be noticed and reviewed on appeal whether or not it was assigned." *Word v. Motorola, Inc.*, 135 Ariz. 517, 520, 662 P.2d 1024, 1027 (1983).

¶8 Forcible entry and detainer was originally conceived as a remedy for landlords seeking to "obtain[] possession of the premises withheld by a tenant in violation of the covenants of his tenancy or lease." *Olds Bros. Lumber Co. v. Rushing*, 64 Ariz. 199, 204,

167 P.2d 394, 397 (1946). Thus, of the three sections in the Arizona Revised Statutes that define the relationships and transactions in which the remedy of forcible detainer is available, "[b]oth A.R.S. §§ 12-1171 and 12-1173 apply only when the parties have a landlord-tenant relationship." *United Effort Plan Trust v. Holm*, 209 Ariz. 347, ¶ 21, 101 P.3d 641, 644-45 (App. 2004).

¶9 In 1984, the Arizona legislature added the third section, § 12-1173.01. 1984 Ariz. Sess. Laws, ch. 121, § 2. The new provision "expanded the scope of the remedy to include transactions in which one holds over in possession after the property has been sold through foreclosure, trustee's sale, forfeiture, execution, or other transactions where 'the property has been sold by the owner and the title has been duly transferred.'"[3] *Curtis v. Morris*, 186 Ariz. 534, 535, 925 P.2d 259, 260 (1996), *quoting* A.R.S. § 12-1173.01(A)(5).

¶10 Thus, a cause of action for forcible entry and detainer is only appropriate in those situations in which a tenant or former owner holds over in possession after a lease has terminated or the property has been sold or otherwise transferred under the terms specified by the statute. And the "only issue" in such actions "shall be the right of actual possession and the merits of title shall not be inquired into." A.R.S. § 12-1177(A). Accordingly, a forcible entry and detainer action is a summary proceeding that "do[es] not furnish all of the

[3]Our supreme court has stated that before § 12-1173.01 was added to the statute, the original two sections were interpreted broadly to include as a tenant at will or sufferance "'[o]ne who remains in possession of property after termination of his interest under a deed of trust.'" *Curtis*, 186 Ariz. at 535, 925 P.2d at 260, *quoting Andreola v. Ariz. Bank*, 26 Ariz. App. 556, 558, 550 P.2d 110, 112 (1976).

procedural safeguards provided in a general civil action." *Colonial Tri-City Ltd. P'ship v. Ben Franklin Stores, Inc.*, 179 Ariz. 428, 433, 880 P.2d 648, 653 (App. 1993). Therefore, when there is a genuine dispute over "an issue whose resolution is a *prerequisite* to determining which party is entitled to possession," a forcible entry and detainer action is not appropriate. *Id.* Rather, such a dispute must be tried in an "ordinary civil action, in which time periods are not accelerated, counter- and crossclaims are allowed, and there is an opportunity for discovery." *RREEF Mgmt. Co. v. Camex Prods., Inc.*, 190 Ariz. 75, 79, 945 P.2d 386, 390 (App. 1997).

¶11 Here the original owner of the property, Soza, had vacated the premises, and it is the putative new owner, El Jardin, who is in possession. In order for a forcible entry and detainer action to be appropriate under these circumstances, Soza was required to show either that El Jardin was his tenant, as required by A.R.S. §§ 12-1171 and 12-1173, or that El Jardin had retained possession pursuant to one of the transactions specified in A.R.S. § 12-1173.01, transferring ownership from El Jardin to Soza. There is simply no evidence that any such relationship existed or that there had been such a transaction.[4]

[4]In his complaint, other than the sections requiring a landlord-tenant relationship, Soza specifically cites § 12-1173.01(A)(1), which authorizes forcible detainer "[i]f the property has been sold through the foreclosure of a mortgage, deed of trust or contract for conveyance of real property pursuant to title 33, chapter 6, article 2." That title, in turn, requires that such foreclosure must be "by action in a court." A.R.S. § 33-721. We can find no evidence of any such sale or foreclosure action.

¶12 Thus, "[a] genuine dispute exists that can only be resolved beyond the limitations of a summary forcible-detainer action and in the context of a conventional civil action." *United Effort Plan Trust*, 209 Ariz. ¶¶ 23-24, 101 P.3d at 645. Although Soza appended to his complaint a default judgment from the Maricopa County Superior Court quieting his title to the property with respect to certain named defendants, El Jardin was not among those defendants. At the time this action was filed, therefore, there was apparently no judgment resolving the respective ownership rights of Soza and El Jardin to the property.

¶13 A trier of fact could conclude that the transfer of title from Soza to El Jardin was valid, as El Jardin claims, or could believe Soza's claim that this transfer was fraudulent. *See RREEF Mgmt. Co.*, 190 Ariz. at 78, 945 P.2d at 389. But resolution of this issue is a prerequisite to determining whether Soza has the right to possess the property because his claim of such a right rests solely on his claim of title. And, because "the merits of title may not be litigated in a forcible detainer action," the trial court was precluded from deciding that issue. *Curtis*, 186 Ariz. at 535, 925 P.2d at 260; *see also Olds Bros. Lumber Co.*, 64 Ariz. at 204, 167 P.2d at 397 (Forcible entry and detainer statute's wording is "plain, unequivocal and positive language and definitely raises a prohibition to making title to the premises an issue.").

Disposition

¶14 For the foregoing reasons, we vacate the trial court's judgment in favor of Soza and remand with directions to dismiss the complaint. El Jardin has requested attorney fees,

but fails to cite a statutory basis authorizing the award. *See City of Phoenix v. Phoenix Employment Relations Bd.*, 207 Ariz. 337, ¶ 30, 86 P.3d 917, 925 (App. 2004). We therefore deny its request for attorney fees on appeal. As the prevailing party, El Jardin is entitled to costs upon compliance with Rule 21, Ariz. R. Civ. App. P., and to reimbursement of payments made pursuant to the trial court's Order to Stay.

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GARYE L. VÁSQUEZ, Judge

CONCURRING:

_____
PETER J. ECKERSTROM, Presiding Judge

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PHILIP G. ESPINOSA, Judge